



Date: December 29, 1997

Case No.: 95-INA-00360

In the Matter of:

DR. DIANE DANIS McKIBBEN,
Employer

On Behalf Of:

MARIA GARCIA I. GOMEZ,
Alien

Appearance: John Stephen Glaser, Esq.
For the Employer/Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 7, 1993, Dr. Diane Danis McKibben ("Employer") filed an application for labor certification to enable Maria Gracia Imbriano Gomez ("Alien") to fill the position of Child Tutor (AF 27-29). The job duties for the position were listed as:

Complete care of one child, age 2½ in private home. Overseeing his personal habits, manners, behavior and health. Prepare his meals & outside activities. Institute a program of instruction for the child in language development, including alphabet recognition, sounds, colors study, as well as a program of instruction in the traditions, arts, music, history and culture of Argentina & the Spanish language based upon his age and developmental skills.

The only requirement for the position was two years of experience in the job offered, but the Employer listed verifiable references and no smoking or drinking while on duty under Other Special Requirements. Although the job title on the application was "Child Tutor," the position was classified as "Tutor" under DOT occupational code 099-227.034.²

The Employer submitted a letter dated January 27, 1994, (AF 29) amending the job title to "Tutor;" amending the wage offer from \$1352/month to \$1801/month; amending the experience requirement to be 2 years in the job or 2 years in the related occupation of Child Tutor³; and amending the job description, as read as follows:

Institute a program of instruction in early language development, sounds, colors and numbers as well as a program of instruction in the arts, culture, music and history of Argentina, and the Spanish language, for child age 4 at appropriate level.

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

² 099.227-034 TUTOR (education) Teaches academic subjects, such as English, mathematics, and foreign languages to pupils requiring private instruction, adapting curriculum to meet individual's needs. May teach in pupil's home. GOE: 11.02.01 STRENGTH: L GED: R5 M3 L5 SVP: 7 DLU: 77

³ 099.227-010 CHILDREN'S TUTOR (domestic ser.) Cares for children in private home, overseeing their recreation, diet, health, and deportment: Teaches children foreign languages, and good health and personal habits. Arranges parties, outings, and picnics for children. Takes disciplinary measures to control children's behavior. Ascertains cause of behavior problems of children and devises means for solving them. When duties are confined to care of young children may be designated Children's Tutor, Nursery (domestic ser.). GOE: 10.03.03 STRENGTH: L GED: R4 M2 L4 SVP: 5 DLU: 77.

Devise learning games and prepare lesson plans. Confer with parents on child's progress.

The CO issued a Notice of Findings on August 15, 1994 (AF 21-25), proposing to deny certification on three grounds. First, the CO found that the Employer's requirements for two years of experience in the job or two years of experience as a Child Tutor, and the job duty of instruction in the traditions, arts, music, history, and culture of Argentina, are unduly restrictive and, thus, in violation of 20 C.F.R. § 656.21(b)(2)(i)(A), because the duties described are those of a Child Tutor.⁴ Second, the CO determined that the offered job includes a combination of duties (Children's Tutor/Child Monitor) in violation of 20 C.F.R. § 656.21(b)(2)(ii). Third, the CO found that the Alien does not meet the requirements of the job; specifically, she lacks two years of experience as a tutor and she only has an elementary school education, which the CO stated is "hardly adequate preparation to teach academic subjects."

Accordingly, the Employer was notified that it had until September 19, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, dated September 12, 1994 (AF 12-20), the Employer contended that, initially, the CO's statement that the child is 2½ years of age is inaccurate as the Employer submitted an amendment letter on January 24, 1994, that the child is four years of age. Additionally, the Employer refers to the amendment letter of January 24, 1994, in pointing out that the job duties were also amended; they "encompass" an academic environment. The Employer also argues that the job duties, as amended, describe those of a Tutor, DOT 099.227-034, which carries an SVP of 7, which is two to four years of experience. Accordingly, the Employer contends that two years of experience is not a restrictive requirement but that, rather, it would be "the least restrictive amount of experience that could be required for this position; two years." Secondly, the Employer contended that there is no combination of duties as none of the "amended" job duties mention those of a Child Monitor. The Employer attached a Schedule of Instruction in support of this contention. Finally, the Employer contended that the Alien has four years of experience as a Child Tutor. Regarding the CO's statement that the Alien only has an elementary school education, the Employer responded that she is not requiring a minimum education requirement.

The CO issued the Final Determination on October 12, 1994 (AF 10-11), denying certification because the Employer has not documented the business necessity of her "excessive experience requirement and of the academic subjects for a pre-schooler," and are, therefore, considered to be preferences for her convenience and unduly restrictive. Additionally, the CO determined that the Employer has not justified the combination of duties described, nor has she adequately shown that the Alien is qualified to perform the duties described.

⁴ We note that the CO incorrectly states that the Child Tutor position carries an SVP of 6 (one to two years), when in fact, the position of Child Tutor carries an SVP of 5 (Over 6 months up to and including 1 year).

On November 11, 1994, the Employer requested review of the Denial of Labor Certification (AF 1-9). In March 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals (“BALCA” or “Board”).

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan.13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

It must be first determined in this case whether the job offered is that of a Tutor or a Child Tutor as those positions are defined in the *Dictionary of Occupational Titles*. The significance of this classification issue is that the position of Tutor permits “over 2 years up to and including 4 years” of education or experience, while the position of Child Tutor permits only “over 6 months up to and including 1 year.”

Initially, the Employer called this position “Child Tutor,” and listed job duties which closely mirror those of Child Tutor. However, the position was initially classified by the Department of Labor as having the occupational code of “Tutor.” Subsequently, the Employer amended the job title to reflect the title of “Tutor”, and also amended the job duties. However, the CO’s NOF appears not to have considered the amended title and duties, referencing matters such as the child’s age of 2½ which are only contained in the original and not in the amended application. After considering the wrong job duties, the CO then concluded, not surprisingly, that the job was that of a Child Tutor. Thus, the CO concluded that the Employer’s job requirements exceed those of Child Tutor, are considered unduly restrictive and therefore required the employer to show business necessity. Clearly, the CO should have considered the amended duties instead of the original duties. However, we find that the CO’s error is harmless.

We have reviewed the Employer’s amended job duties and agree that even the amended duties more closely fit the position of Children’s Tutor than the position of Tutor. This is particularly true considering the young age (4) of the child. Therefore, we agree with the CO’s analysis that the Employer’s job requirements exceed the DOT for the position of Child Tutor, and thus the finding that the Employer’s experience requirements, as well as its requirement for instruction in the traditions, arts, music, history, and culture of Argentina, are unduly restrictive.

The Employer, chose to rebut the NOF by arguing that the proper classification is that of Tutor. The Employer did not offer any evidence to establish business necessity and did not offer to reduce the requirements and readvertise, as directed by the CO. As such, we find that the CO’s denial of labor certification must be affirmed.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

